UNITED STATES OF AMERICA
DEPARTMENT OF TRANSPORTATION
OFFICE OF THE SECRETARY
WASHINGTON, D.C.

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Issued by the Department of Transportation
on the 14th day of June, 1996

Joint Application of **DELTA AIR LINES, INC.** **SWISSAIR, SWISS AIR TRANSPORT COMPANY, LTD.** **SABENA S.A., SABENA BELGIAN WORLD AIRLINES, and** **AUSTRIAN AIRLINES, ÖSTERREICHISCHE LUFTVERKEHRS AG** for approval of and Antitrust Immunity for Alliance Agreements pursuant to 49 U.S.C. §§ 41308 and 41309	**Docket OST-95-618**

FINAL ORDER

By this Order, we grant final approval and antitrust immunity for three separate and parallel Cooperation Agreements and a Coordination Agreement among the four Joint Applicants covering the coordination of the three Cooperation Agreements (collectively referred to herein as the "Alliance Agreements"),[1] between Delta Air Lines, Inc. ("Delta"), Swissair, Swiss Air Transport Company, Ltd. ("Swissair"), Sabena S.A., Sabena Belgian World Airlines ("Sabena"), and Austrian Airlines, Österreichische Luftverkehrs AG ("Austrian") pursuant to 49 U.S.C. §§ 41308 and 41309. Our action is subject to the provisions that the antitrust immunity will not cover (1) any activities of Delta and Austrian/Swissair as owners of Worldspan, L.P. and Galileo, and (2) the services relating to fares and capacity for particular categories of U.S. point-of-sale local passengers in the Atlanta-Brussels, Atlanta-Zurich, and Cincinnati-Zurich markets, as fully described below. We direct the Joint Applicants to resubmit for renewal their variously styled alliance agreement(s) five years from the date of the issuance of this Order. If the Joint Applicants choose to operate under a common name or

[1] The term "Alliance Agreements" as used herein means the following agreements between and among the Joint Applicants: (1) the Cooperation Agreements dated September 8, 1995, between Delta, on the one hand, and Austrian, Sabena, and Swissair, on the other hand; (2) the Coordination Agreement dated September 8, 1995, among Delta, Austrian, Sabena, and Swissair; (3) any implementing agreements that the Joint Applicants conclude pursuant to the September 8, 1995, Cooperation and/or Coordination Agreements to develop and carry out the Delta, Austrian, Sabena, and Swissair alliance; and (4) any subsequent agreement(s) or transaction(s) by the Joint Applicants pursuant to the foregoing agreements, unless otherwise noted in this order.

brand, they must obtain advance approval from the Department of Transportation ("the Department") before implementing the arrangement.

As an express condition to the grant of antitrust immunity to the Alliance, we also direct Delta, Austrian, Sabena, and Swissair to withdraw from any participation in any International Air Transport Association ("IATA") tariff coordination activities that discuss any proposed through fares, rates or charges applicable between the United States and Austria, Belgium, or Switzerland; the United States and Germany or the Netherlands; and/or the United States and any other countries designating a carrier granted antitrust immunity, or renewal thereof, for participation in similar alliance activities with a U.S. carrier. We further direct the Joint Applicants to report full-itinerary Origin-Destination Survey of Airline Passenger Traffic data ("O&D Survey") for all passenger itineraries that include a United States point (similar to the O&D Survey data already reported by Delta).

As we stated in Show Cause Order 96-5-26, we will closely monitor the competitive environment in the three hub-to-hub markets not granted antitrust immunity, as well as the four New York-Europe markets of particular concern to the DOJ. We will reexamine each of these seven markets during the next eighteen months to determine whether immunity continues to be appropriate for the three hub-to-hub markets and remains in the best interests of consumers and competition, and also whether the four New York-Europe markets should continue to receive antitrust immunity. This review will be conducted in full cooperation with the Department of Justice.

I. BACKGROUND

A. The Joint Applicants' Request[2]

On September 8, 1995, Delta, Austrian, Sabena, and Swissair filed a request seeking approval of and antitrust immunity for certain Alliance Agreements, for a five-year term. Through their Alliance Agreements, the Joint Applicants state that they intend to expand their existing cooperative marketing relationships, which have involved point-to-point code-share arrangements on a limited number of routes, by entering into a more comprehensive business alliance that would cover the coordination of three parallel Cooperation Agreements. The applicants state that the purpose of the Agreements is to establish a contractual and legal framework that will allow the four airlines, while retaining their separate corporate and national identities, to establish the proposed Alliance and cooperate to the extent necessary to create a "seamless air transport system." The applicants maintain that if the Alliance Agreements are

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[2] By Order 95-9-27, issued September 25, 1995, we directed the Joint Applicants to provide additional information to supplement their request. By Notice dated October 13, 1995, we found that the record of this case was substantially complete, and we established procedural deadlines. By Order 95-11-5, issued November 3, 1995, we granted the Joint Applicants' request for confidential treatment for certain documents and information, limiting access to these data in certain respects. We also extended the procedural schedule for filing answers and replies to the application.

approved and immunized, they will proceed to negotiate and conclude operating accords that will provide for specific coordination and integration mechanisms regarding scheduling, marketing, planning, joint services and other related matters.[3]

B. Show-Cause Order

On May 21, 1996, the Department issued a Show-Cause Order, Order 96-5-26. We tentatively determined, subject to certain conditions and limitations, to grant approval of and antitrust immunity for the Alliance Agreements among the Joint Applicants. We tentatively decided to direct the Joint Applicants to resubmit their Alliance Agreements five years from the date of issuance of the final order in this case. The Department noted that it was not proposing to authorize Delta, Austrian, Sabena, and Swissair to operate under a common name or brand. The Department determined that, if the Joint Applicants choose to operate under a common name or brand, they will have to obtain prior separate approval from the Department before implementing the arrangement.

We also tentatively decided to exclude certain matters relating to fares and capacity for particular categories of U.S. point-of-sale local passengers on the Atlanta-Brussels, Atlanta-Zurich, and Cincinnati-Zurich routes, as agreed between the applicants and the Department of Justice ("DOJ").[4] We tentatively determined, as a condition to the grant of immunity, to direct the Joint Applicants to withdraw from all IATA tariff coordination activities affecting through prices between the United States and Austria, Belgium, or Switzerland and for other markets described herein.

We also tentatively decided to direct Austrian, Sabena, and Swissair to report full-itinerary O&D Survey data for all passenger itineraries that include a United States point (similar to the O&D Survey data already reported by Delta). Further, we tentatively determined to direct the Joint Applicants to file all subsidiary and subsequent agreement(s) with the Department for prior approval.

We also provided the Joint Applicants and any interested party an opportunity to comment on our tentative findings and conclusions.

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[3] The applicants state that they have not made such agreements because, in the absence of immunity, such arrangements would subject the carriers to the risk of antitrust litigation. Joint Application, at 10 and 41-42.

[4] Notwithstanding the above, we also found it appropriate to approve and grant immunity with respect to these three hub-to-hub markets -- Atlanta-Brussels, Atlanta-Zurich, and Cincinnati-Zurich -- for certain categories of fares that include restrictions requiring a minimum stay of at least seven days or that require a Saturday night stay as a condition of the fare. Our Order further noted that we fully intend to review our findings regarding the Atlanta-Brussels/Zurich, Cincinnati-Zurich, as well as New York-Brussels/Geneva/Vienna/Zurich markets, in cooperation with the DOJ, within eighteen months to determine whether our findings should be discontinued or modified, in light of actual developments in these seven markets. *See* Appendix A, at 2-3.

II. Responsive Pleadings to Order to Show Cause

On May 28, 1996, the International Air Transport Association ("IATA"), the Department of Justice, United Air Lines, Inc. ("United"), and the Joint Applicants filed comments/objections. The parties do not dispute our finding that the Alliance Agreements will benefit the public by enabling the Joint Applicants to provide better service and to operate more efficiently. However, DOJ believes that the alliance will eliminate existing competition in those markets, that the availability of connecting services between New York and Geneva, Zurich, Brussels, and Vienna will not discipline the applicants' fares for nonstop service for time-sensitive travelers, and that other airlines are unlikely to enter the markets.

A. IATA

IATA continues to oppose the imposition in this proceeding of the proposed condition limiting participation in IATA tariff coordination activities by immunized alliances. As it has in previous filings in this and other dockets,[5] IATA takes the position that "all issues involving continued participation in IATA tariff coordination" should be considered in Docket 46928, involving IATA's 1990 application for continued Traffic Conference immunity. IATA argues that the proposed condition is inappropriate because (1) various affected airlines and their respective governments have not had sufficient time to respond to Order 96-5-26; (2) the proposed condition is inconsistent with other findings in this proceeding; (3) the proposed condition lacks record support; and (4) Order 96-5-26 does not sufficiently address the concerns of smaller international carriers and their governments regarding the effect of such a condition on interlining.

B. The Department of Justice

The DOJ fully supports our tentative decisions (1) to condition and limit our grant of antitrust immunity in the Atlanta-Brussels/Zurich, and Cincinnati-Zurich markets; (2) to impose certain limitations on IATA tariff coordination activities; and (3) to require Austrian, Sabena, and Swissair to report full-itinerary O&D Survey data.

The DOJ does have certain concerns as to our tentative grant of "full" antitrust immunity for the four New York markets and suggests that we reconsider our determinations regarding these markets in certain respects. DOJ's competitive concerns, as to these markets, are (1) "time-sensitive travelers do not have good substitutes for nonstop scheduled airline service"; and (2) "the prospects for entry by additional airlines into the New York markets that is sufficient and

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5 *See* references in Order 96-5-26, at 10, and, in Docket OST-96-1116, in Order 96-5-12, at 9-10, and in Order 96-5-27, at 5.

timely enough to deter or counteract the potential anticompetitive effects of the Alliance Agreements in these markets are remote."[6]

DOJ's analysis is that the alliance will reduce nonstop competition in the New York marketplace.[7] DOJ further suggests that for the time-sensitive (largely business) passenger one-stop service is not a reasonable substitute for nonstop service, and that the loss of competition in the New York market(s) potentially threatens the time-sensitive business passenger with the possibility of anticompetitive price increases.[8] Moreover, the DOJ questions our tentative judgment that existing competition and the prospects for new entry in the New York marketplace, a prospect that DOJ states could mitigate its concerns about lost competition in these four markets, will be of a timely and sufficient character to deter or prevent any anticompetitive effects of the Alliance Agreements.[9] Finally, while the DOJ states that it fully intends to work with the Department in monitoring the affected markets, the DOJ suggests that we reconsider our determination granting full immunity for the four New York markets.[10]

C. Delta, Austrian, Sabena, and Swissair

The Joint Applicants request that the Department clarify in its Final Order that the Department's approval of and antitrust immunity for the Alliance Agreements extend to include the Joint Applicants' respective corporate subsidiaries.[11] The Joint Applicants also request that the Department's Final Order expressly define the term "Alliance Agreements," and that any IATA tariff coordination limitation conform to ordering paragraph 3 of Order 96-5-27.

D. United

While taking no position regarding our tentative order, United states that it supports the approval of alliances between U.S. and foreign airlines "where there are pro-competitive Open Skies regimes assuring freedom of entry." Concurrently, United filed a motion for leave to file an otherwise unauthorized document.[12]

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6 Comments, at 3.

7 Comments, at 5-7.

8 Comments, at 7-13.

9 Comments, at 14-18.

10 Comments, at 25-26.

11 We find it appropriate, consistent with our determinations in Order 96-5-27 and Appendix A to this Order, to extend approval of and antitrust immunity for the Alliance Agreements to include the Joint Applicants' respective corporate subsidiaries.

12 We will grant United's motion.

III. Answers to Responsive Pleadings

On May 31, 1996, the International Air Transport Association, and the Joint Applicants filed comments/answers.

A. IATA

IATA responded to the comments of the Department of Justice in support of the proposed condition limiting IATA tariff coordination activities by immunized alliance carriers. IATA argues that DOJ, like DOT, has not provided a rationale for the condition, apart from "old decisions that are currently under review in Docket 46928" as well as DOJ's contested position as a party in that proceeding.[13] IATA contends that previous findings by the Department that IATA tariff coordination is anticompetitive are an issue in Docket 46928, and that to consider such findings as a basis for the proposed condition compromises the rights and interests of all participants in that docket.

B. Delta, Austrian, Sabena, and Swissair[14]

The Joint Applicants note that none of the commenters oppose the Department's tentative decision to approve and immunize the Alliance, or challenge the Department's tentative findings that the proposed Alliance is procompetitive and would benefit the traveling public. Further, they assert that none of the commenters (1) raise any facts or issues not previously considered by the Department that would undermine the Department's tentative decisions in Show-Cause Order 96-5-26, or (2) provide any basis for the Department to delay the issuance of a Final Order approving and immunizing the proposed Alliance. They maintain that the Department's tentative decision to approve and immunize the Alliance is fully supported by the facts of this case and consistent with the Department's International Policy Statement and precedent. The Joint Applicants urge the Department to affirm Order 96-5-26.

The Joint Applicants assert that DOJ's recommendation for a New York "carve-out" is based on a "flawed" and "unsupported" premise that the magnitude of Delta's New York-domestic operations will impede actual or potential competition. They also state that DOJ's analysis does not recognize various factors that will provide competitive discipline in the New York city-pair markets: (1) that American Airlines provides competing nonstop service in the New York-Brussels/Zurich markets;[15] (2) that several airlines are a potential source of new

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13 Reply, at 1.

14 Concurrently, Delta filed a motion under 14 C.F.R. 302.39 requesting confidential treatment for certain documents and information, we note that answers to the motion were due on June 11, and that the motion is unopposed. We will decide this matter at a later date.

15 Answer, at 10.

competition for the four New York markets;[16] (3) that various New York-Europe city-pair markets, comparable in size to New York-Brussels/Geneva/Vienna/Zurich, receive competing nonstop service by multiple airlines;[17] (4) that each of the four New York markets has received nonstop service by other U.S. airlines;[18] (5) that DOJ's analysis does not recognize the disciplining effect of one-stop connecting service in these four markets;[19] and (6) that the open-skies agreements provide unrestricted opportunities for any U.S. airlines to enter these four routes either directly or through code-share arrangements.[20]

The Joint Applicants further assert that DOJ's economic analysis neither has applicability to these New York-Europe markets, nor should it be accepted, since it is not in the record. They also assert that DOJ errs in its view that potential entry in these markets is remote, since numerous airlines currently serve New York and pose a serious competitive threat as viable potential entrants in each of the New York markets under review.

The Joint Applicants further maintain that the analytical approach DOJ urges the Department to adopt in this case is narrow and unprecedented compared to that adopted in previous similar cases. They state that, in addition to the three relevant markets we previously analyzed (U.S.-Europe, U.S.-country pairs, and discrete city-pairs), DOJ would have the Department recognize for competitive analysis the "time-sensitive" passenger. The Joint Applicants argue that, given the global nature of the Alliance, it would be inappropriate for the Department to accept this DOJ "proposed relevant market." They also assert that any alleged reduction in competition in the four New York markets is limited to code-share/blocked-space service that is not significantly different than the service provided by United-Lufthansa and Northwest-KLM in their "non-carve out markets".[21]

Finally, the Joint Applicants state that if the Department chooses to reconsider the issues raised by IATA, they are willing to agree to accept the IATA-withdrawal condition pending such review, subject to comparable conditions for all other similarly situated U.S. and foreign airlines.

IV. DECISION SUMMARY

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16 Answer, at 11.

17 Answer, at 11-12.

18 Joint Applicants' answer, Exhibit 5.

19 Answer, at 12-13.

20 Answer, at 13.

21 *See* Orders 96-5-27 and 96-5-12, regarding United-Lufthansa, and, Orders 92-11-27 and 93-1-11, regarding Northwest-KLM.

We make final our tentative findings that the Alliance Agreements should be approved and their parties given antitrust immunity, subject to (1) the provisions that the antitrust immunity will not cover any activities of Delta, Austrian, and Swissair, and their respective subsidiaries, as owners of Worldspan, L.P. and Galileo computer reservations systems businesses; (2) the Joint Applicants' withdrawal from IATA functions as described below; and (3) the described conditions as agreed to by DOJ and the Joint Applicants, for the Atlanta-Brussels, Atlanta-Zurich, and Cincinnati-Zurich markets (*see* Appendix A). The commenting parties have not raised any new arguments that would compel our changing our ultimate conclusion. The parties have not disputed that the integration of the alliance partners' services should benefit the public by providing better service and enabling the Joint Applicants to operate more efficiently or that our competition analysis is valid with regard to almost all of the markets at issue. In view of the concerns expressed by the DOJ about four New York routes, we will reexamine the immunization of the applicants' operations on those routes in eighteen months. The Joint Applicants are to resubmit for renewal their expansion agreement(s) in five years from the date of the issuance of this order. If the Joint Applicants choose to operate under a single name or common brand they will have to obtain prior approval from the Department before implementing the change. We also direct the Joint Applicants to file all subsidiary and subsequent agreement(s) with the Department for prior approval.[22]

In addition, we are also finalizing our determinations (1) directing the Joint Applicants, as a condition on the grant of antitrust immunity, to withdraw from all IATA tariff coordination activities relating to through prices between the United States and Austria/Belgium/Switzerland, between the U.S. and Germany, between the U.S. and the Netherlands, as well as between the United States and the homeland(s) of foreign carriers participating with U.S. carriers in other immunized alliances that may be subsequently approved by the Department; and (2) directing Austrian, Sabena, and Swissair to report full-itinerary O&D Survey data for all passenger itineraries that contain a United States point (similar to the O&D Survey data already reported by Delta).

V. DECISIONAL STANDARDS UNDER 49 U.S.C. §§ 41308 and 41309

A. Section 41308

Under 49 U.S.C. section 41308, the Department has the discretion to exempt a person affected by an agreement under section 41309 from the operations of the antitrust laws "to the extent necessary to allow the person to proceed with the transaction," provided that the Department determines that the exemption is required in the public interest. It is not our policy to confer antitrust immunity simply on the grounds that an agreement does not violate the antitrust laws.

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[22] Regarding this requirement, we do not expect the alliance partners to provide the Department with minor technical understandings that are necessary to blend fully their day-to-day operations but that have no additional substantive significance. We do, however, expect and direct the Joint Applicants to provide the Department with any contractual instruments that may materially alter, modify, or amend the Alliance Agreements.

We are willing to make exceptions, however, and thus grant immunity if the parties to such an agreement would not otherwise go forward without it, and we find that grant of antitrust immunity is required by the public interest.

B. Section 41309

Under 49 U.S.C. section 41309, the Department must determine, among other things, that an inter-carrier agreement is not adverse to the public interest and not in violation of the statute before granting approval.[23] The Department may not approve an inter-carrier agreement that *substantially* reduces or eliminates competition unless the agreement is necessary to meet a serious transportation need or to achieve important public benefits that cannot be met or that cannot be achieved by reasonably available alternatives that are materially less anticompetitive.[24] The public benefits include international comity and foreign policy considerations.[25]

The party opposing the agreement or request has the burden of proving that it substantially reduces or eliminates competition and that less anticompetitive alternatives are available.[26] On the other hand, the party defending the agreement or request has the burden of proving the transportation need or public benefits.[27]

VI. DISCUSSION

We have carefully reviewed the answers and replies to our tentative decision and, consistent with our tentative findings and conclusions and the DOJ's overall comments, we find that the grant of antitrust immunity in this case is in the public interest.

As we described in Show-Cause Order 96-5-26, the integration of the four carriers' services will, on balance, enhance competition in transatlantic markets and allow the airlines to provide better service and enable them to operate more efficiently; and it is unlikely that the Alliance Agreements, subject to certain conditions, will substantially reduce competition in any relevant market.

Our analysis indicates that the alliance will have a substantial pro-competitive impact, bringing on-line service to nearly 32,000 city-pair markets with an estimated total traffic volume of 21.4 million passengers. Moreover, it will significantly increase competition and service

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23 Section 41309(b).

24 Section 41309(b)(1)(A) and (B).

25 Section 41309(b)(1)(A).

26 Section 41309(c)(2).

27 *Id.*

opportunities to many of the 6.1 million passengers in behind- and beyond- gateway markets.[28] The increased competition and service options will stimulate new traffic and thus expand the overall international market and increase opportunities for the traveling public and the aviation industry. U.S. consumers, communities, and airlines should be major beneficiaries of this expansion and of the associated increase in service opportunities.

This Department and the Department of Justice are in full accord on these important conclusions, as we are with regard to DOJ's concern as to the possible negative impact on three hub dominated city-pair markets -- Atlanta-Brussels, Atlanta-Zurich, Cincinnati-Zurich. Thus, in the Show-Cause Order, we tentatively excluded those markets from full immunity and we will adopt that tentative decision here.

The DOJ's remaining concern is that time-sensitive travelers in certain New York-Europe nonstop markets (New York-Brussels, Geneva, Vienna, and Zurich) may be subjected to supracompetitive price increases because of diminution of competition now provided by blocked-space arrangements. We have carefully considered the DOJ's information and recommendations, but on balance, do not find it necessary to order a further exclusion from immunity. We note again, however, that the joint review that we and the DOJ will undertake during the second year of this alliance is intended to address any of these issues for which we will then have more empirical evidence of its competitive impact.

A. Approval of and Antitrust Immunity for the Alliance Agreements

In the Order to Show Cause we described the antitrust analysis required by section 41309. We tentatively found that relevant markets included the U.S.-Europe, the U.S.-Austria/Belgium/ Switzerland, and various city-pair markets, as well as the behind- and beyond-gateway markets. Our analysis indicated that implementation of the Alliance Agreements would not reduce competition in the U.S.-Europe, U.S.-Austria/Belgium/Switzerland, and behind- and beyond-gateway markets.

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[28] Our analysis is based on Origin-Destination Survey of Airline Passenger Traffic for the twelve months ended September 1995, adjusted to account for traffic carried by non-reporting foreign airlines. Our decision here is based in part on statistics extracted from restricted international O&D Survey Data and international T-100 and T-100(f) data reported to the Department. We have determined that the public interest warrants our use of and limited disclosure of such data in this proceeding, because the public interest in evaluating this application on the basis of this data clearly outweighs any possible competitive disadvantage U.S. carriers might face from release of the data to foreign carriers. This determination is consistent with (1) the requirements set forth in sections 19-6(b) and 19-7(e) of 14 CFR Part 241 as they pertain to international T-100/T-100(f) data and O&D data, respectively, and (2) the Department's policy statement set forth in 14 CFR section 399.100, which provides that the Department may disclose restricted O&D data consistent with its regulatory functions and responsibilities.

Regarding the city-pair markets, the Joint Applicants undertook to exclude from the scope of their requested immunity capacity, fares, and yield management decisions for particular U.S.-source local passengers in the three markets where Delta is the hub-dominant airline, the Atlanta-Brussels, Atlanta-Zurich, and Cincinnati-Zurich markets, consistent with Appendix A.

The four city-pair markets that remain at issue are New York-Geneva/Zurich/Brussels/Vienna. The show-cause order did not propose to exclude these markets from the scope of approval and antitrust immunity, since we tentatively found that the alliance was not likely to reduce competition in those markets. The DOJ has expressed concern insofar as time-sensitive travelers are affected (the time-sensitive travelers are presumed to be generally business travelers). The DOJ essentially offers three points: that granting immunity for the New York markets will eliminate the actual competition that currently exists between Delta and its partners on the nonstop routes; that the nonstop routes constitute a separate market for a number of time-sensitive travelers, because they are sufficiently unwilling to take one-stop or connecting flights that an airline monopolizing the nonstop service can charge fares that are substantially above competitive levels; and that no other airline is likely to enter any of these four nonstop routes in the event that a lack of competition results in non-competitive, higher fares, due to the economics of the routes, as shown by the past history of U.S. airline service in the four markets. According to the DOJ 72,000 passengers each year will be affected.

The Joint Applicants disagree with the DOJ's allegations that there is a separate nonstop market and that entry into the four New York nonstop routes is unlikely; the applicants do not, however, dispute the DOJ's assertion that they are now competing on the four routes.

The applicants have represented that the New York routes constitute an essential part of the alliance and that the lack of immunity for the applicants' operations on those routes would greatly impair the efficiency of the alliance's operations. They have stated that a denial of immunity for the New York routes would prevent them from implementing the alliance.[29]

We are not convinced that the record demonstrates that approving and immunizing the alliance's New York-Geneva/Zurich/ Brussels/Vienna nonstop service will substantially reduce competition for the vast majority of passengers. While we recognize that our actions will *ipso facto* reduce the number of current competitors for nonstop service -- the alliance will end the Joint Applicants' existing competition under their blocked-space agreements in the four New York markets, which necessarily means some diminution of competition -- we are unable to conclude, based on the record, that actual one-stop and connecting service competition, and the prospect of potential entry, will not adequately mitigate these effects.

Of course, the loss of the nonstop competition between the Joint Applicants on the four New York routes would be of little consequence if other airlines served the nonstop routes or if the numerous connecting services offered between New York, on the one hand, and Brussels, Geneva, Vienna, and Zurich, on the other hand, disciplined the applicants' fares on the nonstop flights. The DOJ states that the connecting services should deny the Joint Applicants the ability

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29 Joint Applicants' Answer, at 6-7.

to charge supracompetitive fares to travelers who are not time-sensitive, since such travelers are likely to take routings that in some cases may be less convenient to reach their destination, to avoid higher nonstop fares. The DOJ's concern thus is directed to those time-sensitive travelers. These travelers are unlikely to take connecting services or one-stop flights instead of nonstop flights unless the nonstop fares are substantially higher than the fares for alternative services, the DOJ believes. DOJ is concerned that since the alliance in the New York markets will eliminate nonstop competition in two of the four markets and reduce the number of nonstop competitors in the other two markets from three to two, the Joint Applicants may be able to charge time-sensitive travelers nonstop fares that will exceed the fare levels that would exist in a competitive market, unless entry is likely.

While the DOJ comments suggest the possibility that nonstop airlines can charge premium fares to some time-sensitive travelers, we question how usefully these transatlantic markets can be compared to domestic markets,[30] and accordingly, whether the basis for the DOJ concerns is fully applicable here so as to demonstrate a substantial loss of competition resulting from immunity.

Of course, even if there is a separate nonstop market for the four New York routes, the alliance would not cause a substantial reduction in competition if other airlines are likely to enter the nonstop markets in a timely and effective way if the applicants raise fares to supracompetitive levels. We tentatively concluded in the show-cause order that entry was likely in the New York markets, since we believed that Delta's small share of the overall New York airline market and the open-skies agreements with Austria, Belgium, and Switzerland (and *de facto* open entry in those countries) would make entry viable if the applicants increased fares above, or lowered service below, the level that would exist in a competitive market.

One issue is whether so-called time-sensitive travelers have a reasonable, though perhaps not perfect, "good" substitute for nonstop service provided by other carriers. The parties have given us anecdotal information such as the statements of travel agents and travel managers that they have provided. This is not the kind of empirical, contestable evidence that would lead us to find that our tentative conclusions are incorrect.

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30 The DOJ has offered information regarding the existence of a relevant market for nonstop "time-sensitive" travelers. Specifically, these include, an econometric study, "NBER Working Paper 5561 "Airline Hubs: Costs, Markups and the Implications of Customer Heterogeneity" written by Steven Berry, Michael Carnall, and Pablo Spiller," whose general conclusion is that hub-dominant carriers charge a premium -- a finding consistent with our own studies (most recently our *Low Cost Airline Service Revolution Study*, April 1996). We do not view these results as directly addressing the transatlantic markets at issue here. It was based on domestic city-pair market experience where the distances are shorter and passenger densities greater than the four "thin," international New York-Europe routes at issue in this case. Specifically, the average market distance examined in the study was 710 miles, whereas the average non-stop distance in the four New York-Europe markets is 3925 miles and the average market densities in the study are more than four times greater than those in the New York-Europe markets. We have found that distance matters. DOJ's analysis of the Atlanta-Salt Lake City and Dallas/Ft. Worth-Boston markets in much the same way addresses domestic markets that are not clearly analogous to those at issue here.

While DOJ focuses on the differences in elapsed trip time between nonstop and one- stop, it should be noted that elapsed time is not the only relevant criterion. Many business travelers prefer a particular airline or group of airlines, either because of frequent-flyer affiliations or perceived standards of service. Others may be flying under negotiated contracts with particular carriers, as indeed travelers financed by the U.S. Government do. Most significant, however, is the radically expanded range of departure and arrival times that becomes available when connections (even if limited to on-line connections) are considered. The increase in elapsed time -- the key identified drawback of these services -- is actually modest, particularly in proportion to the overall journey time; an additional 90 minutes to three hours in a journey of eight to twelve hours may well be offset by the greater overall convenience of selecting among more flights.[31]

This effect tends to equalize connecting and nonstop flights more as the distance between origin and destination increases. In these four New York markets, Brussels is the least subject to this effect: non-circuitous connecting options are fewer, and additional elapsed time is proportionately greater.[32] In the Swiss and Austrian markets, however, the proportional increase diminishes, and the number of on-line connections with modest circuitry are considerable. For example, the westbound flight from Geneva to New York on Delta/Swissair

departs at 12:15 and arrives at 14:45; both Lufthansa and KLM offer on-line connections departing as early as 07:00 and arriving in New York more than two hours earlier.[33] In the Vienna market, the Delta/Austrian westbound service is preceded by KLM, Lufthansa, and British Airways on-line connections that afford earlier New York arrival times.[34] Accordingly, even for the time-sensitive business traveler, connecting services may well constitute a competitive force in markets like these.

We appreciate the DOJ's analysis of passenger preferences in certain domestic markets, we have several reservations regarding the applicability of these analogies to the four transatlantic markets. First, the domestic markets analyzed by the DOJ involve shorter distances, with denser traffic volumes, that receive more frequent nonstop and direct service. The Atlanta-Salt Lake City market, for example, receives eight daily nonstops by Delta,[35] thus reducing the

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31 For example, in the Vienna-New York market both KLM Royal Dutch Airlines (KLM) and Lufthansa German Airlines (Lufthansa) offer both earlier and later returns than Delta/Austrian's nonstop service; in the Zurich-New York market Scandinavian Airlines System (SAS), KLM, and Lufthansa offer earlier returns than Delta/Swissair's nonstop service; in the Geneva-New York market both KLM and Lufthansa offer both earlier and later returns than Delta/Swissair's nonstop service. Source: Official Airline Guide, Worldwide Edition, June 1996.

32 On westbound services, the nonstop flights take roughly 8 hours, while on-line connections range upwards from about ten, with most taking between ten and twelve hours. OAG Worldwide Edition, June 1996 ("To New York").

33 *Id.*

34 *Id.*

35 Official Airline Guide, Electronic Edition, June 1, 1996.

disciplinary potential of on-line connections. More fundamentally, however, that market is a hub-to-hub operation for Delta. In contrast, Delta ranks third, fourth, and even fifth at New York by various standards -- hardly the market presence of which hub power is made.[36] It was precisely because of our concerns that Delta and its foreign partners may exercise hub dominance at Atlanta-Brussels/Zurich and Cincinnati-Zurich that we found it appropriate to accept the "carve out" of these markets.

The other two examples offered by the DOJ actually appear to suggest the increased disciplinary effect of connecting services as nonstops decline. In the Dallas/Ft. Worth-Boston example, where Delta and American offer thirteen daily nonstops,[37] it appears that relatively few passengers use connecting services; in the case of Houston-Boston, where Continental Airlines offers only five nonstops,[38] a greater proportion of travelers use connections. With hubs at only one end of each of these markets, they are also somewhat more analogous to the four transatlantic markets than the Atlanta-Salt Lake City example. These observations suggest that connecting services can to an extent serve as a relevant disciplinary force in the four transatlantic markets.

Aside from the issue of actual competition, we do not fully share the view of DOJ regarding the likelihood of potential competition and new entry from New York. While not serving these four markets, various airlines operate in the transatlantic marketplace to and from New York. Also, as a result of the U.S.-Austria, Belgium, and Switzerland open-skies environments, and *de facto* open entry in those countries, other airlines are free to enter the New York market for the first time. In particular, as the DOJ recognizes, Continental has a major hub at Newark. While we cannot assure new entry into these markets, we conclude that there is real potential for entry in this open-market environment.[39]

Indeed, we believe that low-cost carriers can succeed internationally. For example, American Trans Air, Inc. operates low-frequency service in long-haul markets and offers very low fares, and Laker Airways will operate between Florida and the United Kingdom with aircraft that are more densely configured than is typical. While we cannot anticipate what strategies may be employed by the new-entrant, low-cost airlines to achieve success in the international marketplace, we fully recognize that a multiplicity of strategies are available to these carriers and the market will determine in fact what happens.

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36 Answer of Joint Applicants, at 8.

37 Official Airline Guide, Electronic Edition, June 1, 1996.

38 Official Airline Guide, Electronic Edition, June 1, 1996.

39 While the existence of an "open-skies" aviation agreement with a foreign government is certainly a critical element enabling us to proceed with an evaluation of the competitive impact of an application for antitrust immunity, an open-skies arrangement alone is in no way dispositive of an affirmative finding on the competitive issues involved in a particular case. Our policy is to evaluate and decide applications for antitrust immunity on their merits based on the evidentiary record, the particular markets at issue, and our assessment of the competitive consequences.

We are also mindful of New York's history as a transatlantic gateway. Tower Air and Virgin Atlantic Airways both have maintained successful transatlantic operations without the extensive on-line feed traffic that DOJ regards as essential. Likewise, a U.S. airline does not have to have a network presence at New York in order to develop sufficient flow traffic in the four New York gateway markets. It can achieve acceptable levels of flow traffic by routing service from its interior hub cities over New York. We also note that in the New York-Amsterdam market, a classic example of a hub route subject to antitrust immunity, nonstop services are offered, not just by KLM and Northwest, but also by Martinair Holland and such carriers as Royal Jordanian and Uzbekistan Airways -- relatively small transatlantic airlines with no on-line domestic feed traffic. Martinair Holland is of course a far smaller transatlantic carrier than Northwest and KLM, and the third-country carriers presumably have selected transatlantic routings with an eye to the greatest potential for supplementing their modest transatlantic homeland traffic. While these carriers' priority obviously is their third- and fourth-freedom traffic, they have the incentive to supplement that revenue with as much fifth-freedom traffic as possible. The presence of these carriers suggests that competition with the established beneficiaries of antitrust immunity may be considerably less formidable than some comments suggest.[40]

While declining to embrace fully DOJ's recommendations regarding these markets, we recognize and appreciate that there will necessarily be a diminution of competition in these four markets, and that this loss of competition may be most acute for time-sensitive local passengers, such as business travelers. However, our decisions in this matter are based alternatively on both our economic analysis of the significance of any minor loss of competition and our long-term international aviation policy. We are required by § 41309(b)(1) to balance our international policy goals against potential negative effects that might arise from our immunizing certain transactions; such as the adverse competitive impact or lessening the effectiveness of the resultant alliance. In particular, we note that the Joint Applicants have advised the Department and the DOJ that "carving out" the New York routes would prevent the Joint Applicants from implementing the Alliance Agreements, thus jeopardizing the substantial proconsumer and procompetitive benefits that we foresaw resulting from the Alliance Agreements.[41] We do not see any reasonably available alternative that would produce the same benefits. If our denial of immunity for the New York routes caused the applicants to abandon the alliance, there appears to be no likelihood at this point that the airlines could soon create another alliance that would provide comparable benefits to U.S. travelers.

Finally, this may not be the last word on the matter. Neither we nor any other party can foresee every consequence of a regulatory decision, particularly one as significant as the grant of antitrust immunity to a major global airline alliance. Therefore, working closely with DOJ, we intend to review the operating results of our decision here within 18 months; if necessary, we may amend this decision at that time, in light of actual marketplace developments.

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40 In two of these markets, American already offers nonstop competition, as the Joint Applicants note. Answer of Joint Applicants, at 10.

41 Joint Applicants' Answer, at 6-7.

We accordingly will extend approval and immunity to the New York-Brussels, Geneva, Vienna, Zurich markets. With regard to the other five city-pair markets,[42] we find no barriers to entry, and no party has argued that we should withhold immunity. In addition, none of the parties challenge our tentative conclusion that the Alliance Agreements are consistent with the public interest under sections 41308 and 41309. Specifically, none of the parties dispute that the Alliance Agreements will benefit the public with better service and more efficient Delta, Austrian, Sabena, Swissair operations.

We will also finalize our determinations that antitrust immunity is required in the public interest and that the Joint Applicants are unlikely to proceed with the Alliance Agreements absent the immunity. Accordingly, we grant antitrust immunity to the Alliance Agreements, as conditioned and limited herein.

Approval under section 41309 requires that an agreement not be adverse to the public interest. Granting antitrust immunity under section 41308 requires that the exemption is required by the public interest. It is not our policy to confer antitrust immunity simply on the grounds that an agreement does not violate the antitrust laws. We are willing to make exceptions, however, and thus grant immunity if the parties to such an agreement would not otherwise go forward without it, and we find that grant of antitrust immunity is required by the public interest.

We are unable to conclude, based on this record, that extending immunity to these four New York markets "substantially reduces or eliminates competition."[43] Since the alliance partners will be ending their competitive service in some markets, they could be exposed to liability under the antitrust laws if we did not grant immunity.[44] Based on the above, we found that Delta, Austrian, Sabena, and Swissair are unlikely to proceed with the Alliance Agreements without immunity. No party to this proceeding has disputed these findings.

B. IATA Tariff Coordination Issue

We affirm our tentative decision to condition[45] our grant of antitrust immunity to the Alliance Agreements upon the withdrawal by the Joint Applicants from IATA tariff coordination activities affecting through prices between the U.S. and Austria, Belgium, or Switzerland, as well as between the U.S. and any other country that has designated a carrier whose alliance with a U.S. carrier has been or is subsequently given immunity, or renewal thereof, by us.[46]

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42 Boston-Brussels, Chicago-Brussels/Zurich, and Washington, D.C.-Geneva/Vienna.

43 Section 41309(b)(1).

44 Order 96-5-26, at 20-22.

45 We wish to clarify that the imposition of this condition is fully consistent with our determinations in the United-Lufthansa immunity case, in Docket OST-96-1116, in Order 96-5-27, ordering paragraph 3.

46 This condition would include coordination on prices between the U.S. and Germany, by virtue of the immunity previously granted to the United-Lufthansa Alliance Expansion Agreement by Order

Under this condition, the Alliance airlines may not participate in IATA tariff coordination activities affecting fares, rates and charges between the United States and Austria, Belgium, or Switzerland or between the United States and the homeland(s) of their similarly immunized alliance competitors. Through prices between the U.S. and other countries, as well as all local fares in intermediate and beyond markets, would not be covered by the condition.[47]

The International Air Transport Association (IATA) filed a response to Order 96-5-26 objecting to the proposed condition limiting participation by the Joint Applicants in IATA tariff coordination activities. IATA contends that the findings in Order 95-5-26, as well as the findings in Order 96-5-27 imposing a similar condition on United and Lufthansa in Docket OST-96-1116, do not support the imposition of such a condition in these proceedings, and that "all issues involving continued participation in IATA tariff coordination" should be considered in Docket 46928, involving IATA's 1990 application for continued Traffic Conference immunity.

The Department of Justice (DOJ) filed a response to Order 96-5-26, supporting the Department's proposed condition as being justified by the Department's desire to maximize the potential public benefits of the immunized alliance by increasing the potential for price competition to pass anticipated alliance efficiencies on to consumers and by promoting the development of a true open-skies environment. DOJ states that such action is in the public interest, is consistent with the Department's findings in this and in past proceedings, and is clearly within the Department's authority.

IATA filed a reply to DOJ's comments, contending that DOJ, like DOT, has not provided a rationale for the condition apart from "old decisions that are currently under review in Docket 46928" and DOJ's contested position as a party in that proceeding.[48]

96-5-27 in Docket OST-96-1116, and between the U.S. and the Netherlands by virtue of the immunity previously granted to the Northwest-KLM Commercial Cooperation and Integration Agreement by Order 93-1-11 in Dockets 48342 and 46371. Although the grant of immunity in the KLM-Northwest case did not contain a similar condition, it will be subject to review by the Department in early 1998. As we previously noted, Northwest and KLM have notified the Department that they accept and will immediately implement our IATA condition (*see* Order 96-5-26, at footnote 62).

47 Under this condition, the Alliance carriers could not participate in IATA discussions of the total ("through") price (s*ee* 14 CFR § 221.4) between a U.S. point of origin or destination and an origin or destination in Austria, Belgium, Switzerland, Germany, the Netherlands, or the homeland of a carrier participant in an alliance immunized in the future, whether such prices are offered for direct, on-line, or interline service. They could, however, discuss local segment prices, arbitraries, or generic fare construction rules that have independent applicability outside such markets. IATA activities covered by our condition would include all those discussing prices proposed for agreement, including both meetings and exchanges of documents such as those preceding meetings and those used in mail votes.

48 The Joint Applicants filed an answer to the various comments to Order 96-5-26, taking "no position with respect to IATA's request" in this proceeding.

IATA's arguments do not persuade us to modify our tentative decision, and we will therefore finalize the condition as proposed. IATA's arguments have been substantially addressed in three previous orders, and we find that those findings and conclusions apply in this context as well.[49] Nothing in IATA's comments in this docket demonstrates error or impropriety either in our previous determinations or in our proposed condition in this proceeding.

IATA continues to maintain that potentially interested parties, particularly those filing comments supporting IATA tariff coordination in Docket 46928, have not had sufficient notice or opportunity to comment on the proposed condition in this proceeding. However, our public show-cause procedures have not kept interested parties from filing extensive and detailed comments on other issues raised in Order 95-5-26. Moreover, IATA does not claim that it lacked time to prepare its own comments. Furthermore, IATA's primary position relates not to the specifics of our condition, but rather to the asserted impropriety of taking any action to restrict IATA participation outside of Docket 46928. As noted in Order 96-5-27, the Department by public order raised the possibility of action in the context of the application in this proceeding over seven months ago,[50] and IATA has filed nearly identical arguments regarding what it calls an issue of "general significance" on three previous occasions, beginning on November 13, 1995, in this docket.[51] Similarly, the specific features of, and rationale for, our condition were discussed in Order 96-5-12, issued May 9, 1996. Under such circumstances, IATA's "due process" complaints are entitled to no weight.

IATA continues to argue that the proposed condition ignores the record and prejudges important issues "under review" in Docket 46928, such as whether IATA tariff coordination substantially reduces competition and whether such coordination is justified by its role in facilitating interlining by smaller international carriers. We continue to disagree.

As noted in Order 96-5-27, the earlier proceeding does not involve the issue of "dual" immunity, whereas that is a central issue in these alliance immunity proceedings. This proceeding, moreover, involves our consideration of the applicants' request for approval and antitrust immunity for a specific transaction, not an overall review of the IATA Traffic Conference structure. The applicants have urged us to issue a final decision on their request promptly so that they may implement their agreement, an agreement which we find should greatly benefit many U.S. travelers. Our condition on the applicants' participation in IATA neither requires IATA to change its operations nor limits the activities of other IATA member airlines. Our condition does not preclude the applicants from participating in discussions of the transatlantic fares of the greatest concern to each of IATA's other foreign airline members: the

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49 Order 96-5-12, at 27-28, Order 96-5-27, at 9-13, and Order 96-5-26, at 29-31. In its May 28 comments in this proceeding, IATA incorporates by reference its response to Order 96-5-12 and acknowledges the commonality of its arguments to both proceedings.

50 Order 95-9-27, issued September 25, 1995.

51 Presumably such comments were coordinated with, or at least notified to, IATA's members, who were in turn able to inform their governments.

fares for passengers between the U.S. and the homelands of the other members. In these circumstances, we can rationally and fairly decide whether the applicants' continued participation in IATA is in the public interest without reexamining our past findings on the impact of IATA price coordination or prejudging arguments made on broader issues by parties in Docket 46928.[52]

In this proceeding and in Docket OST-96-1116, we have found that antitrust immunity to permit the proposed carrier alliances is justified by the overall public benefits in the form of better, more efficient service. We are, however, then faced with the public interest need to maximize those benefits by insuring, to the greatest extent possible, that the efficiencies are passed on to consumers in the form of competitive prices. The condition is therefore a necessary part of our overall decision in these cases.

IATA continues to argue that there is no record-based rationale for the proposed condition because (1) such a condition is inconsistent with findings in Order 96-5-26 and 96-5-12 that transatlantic markets are "highly competitive" notwithstanding IATA tariff coordination and the participation of the immunized Northwest-KLM alliance; (2) there is no evidence that alliance immunity will cause any internal anticompetitive effects or that excluding alliances from IATA tariff coordination in certain markets will mitigate such anticompetitive effects; and (3) there is no basis for excluding alliances in markets where they do not offer directly competing service.

Again, these arguments were squarely addressed in Order 96-5-27. Findings by the Department regarding competition in markets covered by IATA tariff coordination simply reflect the historical fact that IATA is not a perfectly effective pricing cartel. Such findings are certainly not inconsistent with actions, such as the condition imposed here, designed to maximize the public interest benefits resulting from our decision to grant the alliance immunity.[53] Our finding in Order 96-5-26 that IATA tariff coordination is likely to undermine potential price competition among competing immunized alliances remains fully supported by the Department's findings on the anticompetitive nature of such coordination in Order 85-5-32 and in other orders. As the Department of Justice correctly points out, those findings remain valid until changed regardless of whether DOT is currently reviewing the grant of immunity

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[52] As DOJ points out, our last order extending antitrust immunity for the IATA Traffic Conferences fully reaffirmed the findings made by the Civil Aeronautics Board in its evidentiary proceedings that the IATA tariff coordination process "substantially reduces competition" in international air transportation. Order 85-5-32, at 5.

[53] There is therefore no inconsistency, as claimed by IATA, between the basis for our condition and our finding that the alliance, as approved, will not substantially reduce competition in any relevant market. We may not grant antitrust immunity without a finding that it is in the public interest. As shown by our past decisions on immunity requests, we do not routinely grant applications for immunity, even if the underlying transaction will not substantially reduce competition. It is entirely appropriate for us to conclude, as we have here, that a condition limiting the parties' preexisting immunity for engaging in other conduct barred by the antitrust laws should be imposed when necessary to maximize the public benefits from the new grant of immunity.

that was made in that order. Our finding that alliance immunity poses some risk to consumers through internal anticompetitive effects follows from the fact that such immunity is more complete than that for IATA tariff coordination, which is subject to numerous conditions designed to mitigate its anticompetitive effects.[54] Finally, the scope of our condition is consistent with existing competition between transatlantic services and gateways, coupled with the potential for new competing services under market-oriented regimes. As noted in Order 96-5-26, the scope of the condition involves a balancing of public interest factors, including our interests in protecting U.S. consumers, encouraging service and price competition, and recognizing diverse foreign policy interests. IATA has provided no basis for discrediting our judgment as to that balance.

While IATA again contends that the broadest possible tariff conference participation facilitates interlining, it has provided no evidence that our condition limiting the applicants' participation will in fact preclude IATA's other members from interlining. Similarly, IATA has provided no explanation of how our condition could undermine the ability of any members to interline with the applicants. More importantly, IATA has made no response to our observation in Order 96-5-27 that several major U.S. airlines -- American, Continental, TWA, USAir and Tower -- do not participate in IATA's tariff coordination activities for transatlantic fares, yet those airlines generally have interline relationships with numerous foreign airlines. Nor has IATA contested our finding in Order 96-5-27 that applying our condition to U.S.-homeland markets of alliance carriers should prove to be no detriment to the smaller international carriers (to the extent that they believe their interlining needs are furthered by IATA tariff coordination), since their interline needs exist primarily in markets beyond the alliance homelands, where alliance participation in IATA tariff coordination is not precluded.

In conclusion, we note that IATA has not challenged our description in Order 96-5-26 of how our condition would be implemented, and we will accordingly make that description final. However, it is possible that some questions may arise in the future regarding the implementation of our condition. To resolve such questions efficiently, we will herein delegate authority to the Director, Office of International Aviation, to provide guidance on the implementation of the condition consistent with the scope set forth in Order 96-5-26.

C. O&D Survey Data Reporting Requirement

No party opposes the imposition of an Origin-Destination Survey of Airline Passenger Traffic (O&D Survey) reporting requirement, and the DOJ strongly supports our proposal to require such data. However, to further ensure that our grant of antitrust immunity does not lead to anticompetitive consequences, we have decided to grant confidentiality to the foreign applicants' Origin-Destination data reports and special reports on code-share passengers. Currently, we grant confidential treatment to international Origin-Destination data. We provide these data confidential treatment because of the potentially damaging competitive impact on

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[54] IATA's claim that the alliance "merger" results in nothing more than a larger carrier, and that mere size should be addressed, if at all, in Docket 46928, fails to take this difference in immunity into account as well as the distinction between the issues in the two proceedings noted above.

U.S. airlines and the potential adverse effect upon the public interest that would result from unilateral disclosure of these data (data covering the operations of foreign air carriers that are similar to the information collected in the Passenger O&D Survey are generally not available to the Department, to U.S. airlines, or to other U.S. interests).

14 C.F.R. Part 241 section 19-7(d)(1) provides for disclosure of international Origin-Destination data to *air carriers* directly participating in and contributing to the O&D Survey. While we have found it appropriate to direct the foreign applicants to provide certain limited Origin-Destination data to the O&D Survey, we have determined that neither Austrian, nor Sabena, nor Swissair is an "air carrier" within the meaning of Part 241. 14 C.F.R. Part 241, Section 03 defines an air carrier as "[a]ny citizen of the United States who undertakes, whether directly or indirectly or by a lease or any other arrangement, to engage in air transportation." The foreign applicants accordingly will have no access to the O&D Survey data filed by U.S. air carriers. Moreover, we are making the foreign applicants' data submissions confidential, while maintaining the current restriction on access to U.S. air carrier Origin-Destination data by foreign air carriers.

D. Computer Reservations System ("CRS") Issues[55]

We have decided that the antitrust immunity we are conferring should cover coordinating the presentation and sale of the Joint Applicants' airline services in the Worldspan, L.P. and Galileo systems and other CRSs and coordinating the operations of their internal reservation systems but not the airlines' management of their interests in Worldspan, L.P. and Galileo.[56] As we noted in the show-cause order, the agreement(s) among the Joint Applicants presented a potential competitive problem because each airline, Delta (Worldspan, L.P.) and Austrian/Swissair (Galileo), owned an interest in a CRS competing in the United States. The Joint Applicants' integration of all of their operations could result in the reduction of competition between Worldspan, L.P. and Galileo, although the likelihood of competitive harm may not be great, since Northwest Airlines and Trans World Airlines also own an interest in Worldspan, L.P. and would prevent Delta from controlling the system's operations. We tentatively concluded that the Joint Applicants' CRS interests and operations should be excluded from any grant of antitrust immunity for the Alliance Agreements.

None of the parties opposing the application for approval and antitrust immunity commented on this issue. However, it is clear that the integration of the Joint Applicants' services will require a closer integration of their internal reservations system. Among other things, the Joint Applicants will work to create the ability to improve the entry and display of integrated services in all CRSs and each partner's ability to carry out scheduled planning and yield management for the integrated services.

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55 Our decision in this matter is consistent with our earlier findings in Order 96-5-27 at 17 and Order 93-1-11 at 15-16.

56 The Joint Applicants indicate that they support this conclusion. Application, at 44.

We will make final our conclusions that the integration of the Joint Applicants' operations could create a risk of reduced competition in the CRS business because of Delta, Austrian, and Swissair's interest in a CRS, and that the grant of antitrust immunity should not cover Delta's management of its interest in Worldspan, L.P. nor Austrian and Swissair's management of their interests in Galileo. We also find that excluding the airlines' CRS interests from the grant of immunity will not frustrate their ability to implement the proposed integration of their airline operations, but we recognize that the Joint Applicants will need the ability to cooperate on the display of their services in CRSs and to integrate such operations as yield management and schedule coordination.

E. Operation under a Common Name/Consumer Issues

We affirm our directive that if the Joint Applicants choose to operate under a common name or use "common brands", they must obtain prior approval from the Department prior to such operation.

VII. Summary

We make final our approval and antitrust immunity for the Alliance Agreements, as conditioned in Appendix A, with respect only to the Atlanta-Brussels, Atlanta-Zurich, and Cincinnati-Zurich markets. The grant of antitrust immunity does not cover Delta's and Austrian/Swissair's interests in Worldspan, L.P. and Galileo, respectively. In addition, we affirm our directive that the Joint Applicants resubmit the Alliance Agreements five years from the date of the issuance of this Order. Notwithstanding our final determination, if Delta, Austrian, Sabena, and Swissair choose to operate under a common name or brand, they will have to seek separate approval from the Department before implementing the change.

Furthermore, we affirm our determinations regarding the Joint Applicants' participation in IATA tariff coordination activities, as fully described above. We direct Austrian, Sabena, and Swissair to report O&D Survey data, as defined in this order. We also direct the Joint Applicants to submit any subsidiary and/or subsequent agreement(s) with the Department for prior approval (*see* footnote 22).

Finally, within 18 months, we intend to review, in cooperation with the DOJ, the Joint Applicants' operations to ensure that the effects of the immunity have been consistent with our pro-competitive and pro-consumer objectives.

ACCORDINGLY:

1. We approve and grant antitrust immunity, as discussed by this order, to the Alliance Agreements among Delta Air Lines, Inc., Swissair, Swiss Air Transport Company, Ltd., Sabena S.A., Sabena Belgian World Airlines and Austrian Airlines, Österreichische Luftverkehrs AG, and their subsidiaries, insofar as it relates to foreign air transportation, subject to the provisions that the antitrust immunity will not cover any activities of Delta and Austrian/Swissair as

owners of Worldspan, L.P. and Galileo computer reservations systems businesses, and subject to the limits and conditions indicated in ordering paragraph 3, below, and in Appendix A hereto (only to the extent that Appendix A applies to the Atlanta-Brussels, Atlanta-Zurich, and Cincinnati-Zurich markets);[57]

2. We direct Delta Air Lines, Inc., Swissair, Swiss Air Transport Company, Ltd., Sabena S.A., Sabena Belgian World Airlines, and Austrian Airlines, Österreichische Luftverkehrs AG, and their subsidiaries, to resubmit their Alliance Agreements five years from the date of issuance of this Order;

3. We condition our grant of approval and antitrust immunity to require Delta Air Lines, Inc., Swissair, Swiss Air Transport Company, Ltd., Sabena S.A., Sabena Belgian World Airlines, and Austrian Airlines, Österreichische Luftverkehrs, AG, and their subsidiaries, to withdraw from participation in any International Air Transport Association (IATA) tariff coordination activities that discuss any proposed through fares, rates or charges applicable between the United States and Austria, Belgium, and Switzerland, the United States and Germany and the Netherlands, and/or the United States and any other countries designating a carrier granted antitrust immunity, or renewal thereof, for participation in similar alliance activities with a U.S. carrier;

4. We direct Swissair, Swiss Air Transport Company, Ltd., Sabena S.A., Sabena Belgian World Airlines, and Austrian Airlines, Österreichische Luftverkehrs, AG to report full-itinerary Origin-Destination Survey of Airline Passenger Traffic for all passenger itineraries that include a United States point (similar to the O&D Survey data already reported by their U.S. alliance partner Delta Air Lines, Inc.);[58]

5. We direct Delta Air Lines, Inc., Swissair, Swiss Air Transport Company, Ltd., Sabena S.A., Sabena Belgian World Airlines, and Austrian Airlines, Österreichische Luftverkehrs, AG, and their subsidiaries, to obtain prior approval from the Department if they choose to operate or hold out service under a common name or use “common brands”;

6. We delegate to the Director, Office of International Aviation, the authority to determine the applicability of the directive set forth in ordering paragraph 3, above, and further described in footnote 47, to specific prices, markets, and tariff coordination activities, consistent with the scope and purpose of the condition as set heretofore described;

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57 We specifically exclude the New York-Brussels, Geneva, Vienna, and Zurich markets from the provisions of Appendix A.

58 Regarding this directive, we have already noted the substantial public need for the Department to collect the foreign alliance partners O&D Survey data. In this context, we have stated our intention to fully monitor, in cooperation and coordination with the DOJ, the operating results of the alliance partners in the Atlanta-Brussels/Zurich, Cincinnati-Zurich, and New York-Brussels/Geneva/Vienna/ Zurich markets. We therefore direct the alliance partners to begin reporting all appropriate O&D Survey data for these seven markets immediately.

7. We direct Delta Air Lines, Inc., Swissair, Swiss Air Transport Company, Ltd., Sabena S.A., Sabena Belgian World Airlines, and Austrian Airlines, Österreichische Luftverkehrs, AG to submit any subsequent subsidiary agreement(s) implementing the Alliance Agreements for prior approval;

8. We grant United Air Lines, Inc.'s motion for leave to file an otherwise unauthorized document;

9. We defer action on Delta Air Lines, Inc.'s motion for confidential treatment of certain data and information;

10. This order is effective immediately; and

11. We shall serve this order on all persons on the service list in this docket.

By:

CHARLES A. HUNNICUTT
Assistant Secretary for Aviation
and International Affairs

(SEAL)

An electronic version of this document will be made available on the World Wide Web at: http://www.dot.gov/dotinfo/general/orders/aviation.html

CONDITIONS GOVERNING THE ANTITRUST IMMUNITY FOR THE ALLIANCE AGREEMENTS BETWEEN DELTA AIR LINES, INC. SWISSAIR, SWISS AIR TRANSPORT COMPANY, LTD. SABENA, S.A., SABENA BELGIAN WORLD AIRLINES, AND AUSTRIAN AIRLINES, ÖSTERREICHISCHE LUFTVERKEHRS AG

Grant of Immunity

The Department grants immunity from the antitrust laws to Delta Air Lines, Inc. and Swissair, Sabena, S.A. and Austrian Airlines, and their affiliates, for their Cooperation Agreements and Coordination Agreement (the "Alliance Agreements") dated September 8, 1995 between and among Delta, Swissair, Austrian and Sabena, and for any agreement incorporated in or pursuant to the Alliance Agreements.

Limitations on Immunity

The foregoing grant of antitrust immunity shall not extend to the following activities by the parties: pricing, inventory or revenue management, or pooling of revenues with respect only to local U.S.-point-of-sale passengers flying scheduled nonstop service on Unrestricted Fares or on Corporate Fare Products between Atlanta and Zurich, Atlanta and Brussels and Cincinnati and Zurich, New York and Brussels, New York and Vienna, New York and Geneva, and New York and Zurich; or provision by one party to the other of more information concerning such current or prospective Unrestricted Fares or Corporate Fare Products or seat availability for such passengers than it makes available to airlines and travel agents generally.

Exceptions to Limitations on Immunity

Despite the foregoing limitations, antitrust immunity shall extend to the joint development, promotion, sale, inventory/revenue management, pooling of revenue and other coordination activities by the parties of fares and bids for government travel or other traffic that either party is prohibited by law from carrying on service offered under its own code, Corporate Fare Products and Unrestricted Fares with respect to local U.S.-point-of-sale passengers flying nonstop between Atlanta and Zurich, Atlanta and Brussels and Cincinnati and Zurich, New York and Brussels, New York and Vienna, New York and Geneva, and New York and Zurich, provided that: (i) in the case of Corporate Fare Products, local U.S.-point-of-sale traffic on the nonstop Atlanta-Zurich, Atlanta-Brussels and Cincinnati-Zurich, New York-Brussels, New York-Vienna, New York-Geneva and New York-Zurich routes shall constitute no more than 25% (measured in revenues, bookings, flight segments or tickets) of a corporation's anticipated

travel under its contract with Delta, Swissair, Sabena and/or Austrian and, (ii) in the case of Unrestricted Fares, the Unrestricted Fare must be a Promotional Fare Product, and the Promotional Fare Product must include similar fares for travel in at least 25 city pairs in addition to Atlanta-Zurich, Atlanta-Brussels, or Cincinnati-Zurich, New York-Brussels, New York-Vienna, New York-Geneva or New York-Zurich.

Definitions for purposes of this Order

"Corporate Fare Products" means the offer of nonpublished fares at discounts from the otherwise applicable Unrestricted Fares to corporations or other entities for authorized travel, which discounts may be stated as percentage discounts from specified published Unrestricted Fares, net prices, volume discounts, or other forms of discount.

"Promotional Fare Products" means Unrestricted Fares that offer directly to the general public, for a limited time, discounts from current similar Unrestricted Fares.

"Unrestricted Fares" means published fares not requiring either a Saturday night stay or a minimum stay of seven days or more.

Clarification of scope of limitations on immunity

Under no circumstances shall the limitations on antitrust immunity set forth above be construed to limit the parties' antitrust immunity for activities jointly undertaken pursuant to the Alliance Agreements other than as specifically set forth in this Order. Immunized activities include, without limitation: decisions by the parties regarding the total number of frequencies and types of aircraft to operate on the Atlanta-Zurich, Atlanta-Brussels and Cincinnati-Zurich, New York-Brussels, New York-Vienna, New York-Geneva and New York-Zurich routes, the configuration and scheduling of such aircraft; coordination of pricing, marketing, sales, commissions, inventory and revenue management, and pooling of revenues, access to each other's internal reservations system, and other coordination activities, with respect to i) non-local or non-U.S.-point-of-sale passengers traveling on nonstop flights on the Atlanta-Zurich, Atlanta-Brussels and Cincinnati-Zurich, New York-Brussels, New York-Vienna, New York-Geneva and New York-Zurich routes, and ii) local passengers traveling on such routes other than local passengers traveling on Unrestricted Fares or Corporate Fare Products as described in "Limitations on Immunity" and not falling within the "Exceptions to Limitations on Immunity" set forth herein.

Review of limitations on immunity

Within eighteen months fom the date that this Order become final, or at any time upon application of the parties, the Department will review the limitations on antitrust immunity set forth above to determine whether they should be discontinued or modified in light of: current

competitive conditions in the Atlanta-Zurich, Atlanta-Brussels and Cincinnati-Zurich, New York-Brussels, New York-Vienna, New York-Geneva and New York-Zurich city pairs; the efficiencies to be achieved by the parties from further integration that would be made possible by discontinuation of the limitations on immunity, when balanced against any potential for harm to competition from such a discontinuation; regulatory conditions applicable to competing alliances; or other factors that the Department may deem appropriate.